Van Wijk v 812 Realty LLC
2021 NY Slip Op 30271(U)
January 29, 2021
Supreme Court, New York County
Docket Number: 155800/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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MELISSA VAN WIJK, ARLENE SHANER, JACQUELINE SCHIFFER, JOHN ANDERSON, TIFFANY MILLER, MICHAL GREENBERG-COHEN, HELEN LESHINSKY, JOANNA DRAGICH, LOUISA WANG

Plaintiffs,

- v -

812 REALTY LLC,

Defendant.

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INDEX NO. 155800/2017

MOTION DATE ______

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 172, 173, 174

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 207, 208, 209, 210, 211, 212

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this rent overcharge action, the nine plaintiffs, current or former tenants in a building owned by defendant 812 Realty LLC, seek compensation for alleged willful rent overcharges and a declaration that that their apartments, located at 812 West 181st Street in Manhattan, New York, NY (the Building), are and will continue to be rent stabilized for the duration of their respective tenancies. Defendant counterclaims for attorneys' fees.

In motion sequence No. 004, plaintiffs move pursuant to CPLR 3212 for an order granting the declaration above, freezing each plaintiff's rent at the "last reliable rent," and enjoining defendant from collecting more than that amount. Plaintiffs also seek damages for the

overcharge, which they have not calculated, and dismissal of defendant's affirmative defenses and counterclaim.[1]

In motion sequence No. 005, defendant seeks leave, if required, to file a late summary judgment motion and moves for summary judgment in its favor and for an order setting the rent for plaintiffs' apartment.

Plaintiffs' amended verified complaint (complaint) contains two causes of action. The first is for rent overcharges. The second is for the declaration discussed above and for an order: (1) determining and setting the lawful legal rent for each plaintiff's apartment; (2) directing defendant to correct the registration for each plaintiff's apartment with the New York State Division of Housing and Community Renewal (DHCR); (3) directing defendant to issue reformed leases to resident plaintiffs accurately reflecting their lawful legal rents and rights; and (4) granting resident plaintiffs a permanent injunction barring defendant from collecting rent in excess of the legal regulated rent set forth by the declaratory judgment, plus lawful increases.

In the complaint, plaintiffs allege that defendant, even though it received J-51 tax benefits for the Building, has engaged in a fraudulent scheme, over the course of decades, to evade rent-stabilization and improperly deregulate rent-stabilized apartments by: (1) raising rents between tenancies at an amount greater than legally permissible; (2) inflating claimed amounts for Individual Apartment Improvements (IAIs); (3) providing plaintiffs with leases which led them into believing that they were not in rent-stabilized apartments and that they were paying a lower rent that could be retracted by defendant, when the apartments were rent-stabilized; and(4) failing to inform plaintiffs with non-rent-stabilized leases that they were entitl

[1] In their submissions, plaintiffs discuss what they claim is a "rent-jamming" scheme, but do not state a discernable request for relief here and argue that defendant is attempting to evict them but provide no evidence that any eviction proceeding has been filed.

to rent-stabilized leases, and refusing to renew those plaintiffs' leases, or offering to relocate them to other apartments when their market-rate leases expired, which plaintiffs label as "checkerboarding." Plaintiffs further allege that they believed defendant's representations as to their respective apartment's unregulated status, lacked knowledge as to what defendant spent on renovations to apartments, and were deceived into paying overcharges

BACKGROUND

All plaintiffs are or were residential tenants in the Building, most having rented apartments in the Building during the years 2007 through 2012, with leases which were not rent-stabilized (the Deregulated Apartments). An exception is plaintiff Miller, who rented apartment 33 in the Building in 1999 through a rent-stabilized lease. In addition, in 2010, plaintiff Greenberg-Cohen rented apartment 31, for which she did not receive a rent-stabilized lease, but, in May 2013, she moved to apartment 4 in the Building, which was rent-stabilized. Plaintiffs Dragich and Wang lived in one of the Deregulated Apartments and moved from the Building in March 2016. The remainder of plaintiffs reside in the Building.

Between 2005 and July 2011, defendant filed the Deregulated Apartments as exempt from rent regulation with DHCR. DCHR rent records show that, in August 2015, defendant retroactively registered apartment 31, formerly occupied by Greenberg-Cohen.

By letter, dated January 6, 2016, DHCR informed all building owners that apartments subject to rent-stabilization when the building owner received J-51 benefits must be registered as rent stabilized, including those apartments treated by building owners as exempt due to high-rent vacancy (NYSCEF Doc. No. 120). DHCR explained that owners then receiving J-51 benefits for a building were required to provide notice to tenants that their apartments are rent stabilized and, prior to the expiration of the tenants' current leases,

provide lease renewals with required supporting documents. The letter stated that "the legal rent to be registered cannot exceed the rent actually being paid by the tenant" (*id.*)

In August 2016, defendant retroactively registered apartment 53, vacated by Dragich and Wang in March 2016. Defendant began retroactively registering plaintiff Shaner's apartment on May 9, 2017 for the years 2009-2014, and on May 18, 2017 for 2015 and 2016.

On May 12, 2017, in a Notice of Proposed Action, DHCR informed defendant that it had not registered all apartments as rent stabilized for the 2016 registration cycle and warned of penalties (NYSCEF Doc. No. 121). On May 24, 2017, defendant responded that "all apartments in the building" had been re-registered, but also that 2016 registrations for certain apartments, including those of plaintiffs Anderson, Leshinsky, Shiffer and Van Wijk, would be done by the "RSA,"[2] and mailed when completed to DHCR's registration unit (NYSCEF Doc. No. 122). On May 25, 2017, defendant began retroactively registering those four apartments. It continued registering them, primarily for 2015 and 2016, on June 8, 2017.

On June 2, 2017, defendant sent a letter to DHCR in response to the agency's Notice of Proposed Action, stating that it had registered nine apartments in the building, and was including copies of the registration statements.[3] One of the registration statements was the tenant's copy of its 2015 and 2016 apartment registrations for plaintiff Van Wijk's apartment. Defendant sent Van Wijk a letter, dated June 5, 2017, stating that it had elected not to renew her expired lease and threatening to commence a summary proceeding if she did not vacate her apartment.

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[2] What "RSA" stands for is not stated in the record.

[3] In addition to the procedural history discussed above, DHCR issued an order, dated August 10, 2017, requiring Owner to amend its registrations for 2016 to include 69 apartments, and to register them annually. Owner filed a petition on August 21, 2017, seeking cancellation of that order as moot on the ground that 56 of the building's 66 apartments had been registered, and the rest were exempt as stores or professional units (NYSCEF Doc. No. 125). DHCR ruled that its order was not moot, as it merely directed but did not rule on Owner's compliance with the law.

This action was commenced on June 27, 2017. Plaintiffs Dragich, Greenberg-Cohen, Leshinsky, and Wang joined as plaintiffs through the amended verified complaint filed on December 26, 2017.

DISCUSSION

Plaintiffs and defendant move for summary judgment. A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence [in admissible form] to eliminate any material issues of fact from the case" (*Pullman v Silverman*, 29 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's failure to make such a showing "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [movant's burden "is a heavy one"]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodrigeuz*, 72 AD3d 553, 554 [1st Dept 2010).

Plaintiffs' Summary Judgment Motion

Rent Stabilized Leases

Defendant does not dispute that it received J-51 tax benefits for the Building or that the residential apartments in the Building are and were rent-stabilized prior to their deregulation. "Plaintiffs' rent-stabilized apartment[s] could not be deregulated pursuant to luxury decontrol laws during the period the building was receiving J-51 tax benefits" (Corcoran v Narrows Bayview Co., LLC, 183 AD3d 511, 511 [1st Dept 2020] citing Roberts v Tishman Speyer Props., L.P., 13 NY3d 270 [2009]; Gersten v 56 7th Ave. LLC, 88 AD3d 189 [1st Dept 2011]).

Defendant has registered the Deregulated Apartments as rent stabilized and those plaintiffs who are current tenants of the Deregulated Apartments are "entitled to rent-stabilized status for the duration of the tenancy" (Stulz v 305 Riverside Corp., 150 AD3d 558, 558 [1st Dept 2017]). Accordingly, plaintiffs' unopposed motion for a declaration that they are entitled to rent-stabilized leases for the terms of their tenancies for their apartments will be granted, but only for those plaintiffs who currently reside in the Deregulated Apartments. Dragich and Wang, who no longer reside in the Building, are entitled to a declaration that apartment 53 was rent stabilized during their tenancy. No declaration is required for Greenberg-Cohen's and Miller's current apartments which were not deregulated and were registered as rent stabilized over the years.

Rent Overcharges and The Base Date Rent

Plaintiffs argue that due to defendant's fraud, the rent history for each of the apartments is not reliable and must be frozen at the last reliable registered rent, which each plaintiff has chosen from the apartment's rent history. Plaintiffs aver that the record proves that defendant attempted to evict its tenants while registering fictious rents, and fraudulently deregulated apartments in the first instance, over years, by employing preferential rents, which defendant raised at renewal in order to coerce or force prior tenants to move out of rent-stabilized apartments. Plaintiffs assert that the increased tenant turnover allowed defendant to raise apartment rents through vacancy increases permitted pursuant to Rent Stabilization Code (9 NYCRR 2522.8), so that defendant could reach the pre-Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA) high-rent deregulation threshold more quickly. Plaintiffs further argue that defendant inflated rents improperly, including for IAIs that had not been performed, and failed to provide required lease riders pursuant to section 26-504.2 (b) of the

Administrative Code of the City of New York and 9 NYCRR § 2522.5 (c) [1].[4]

In support of their arguments, plaintiffs submit leases for the Deregulated Apartments, which indicate that those apartments are not rent stabilized. Some of those leases contain amounts for a "legal" or "contract" rent, and a lower "preferential" rent that defendant charged to the tenant, which plaintiffs argue is not necessary for a deregulated apartment. Some plaintiffs, tenants of the Deregulated Apartments, submit affidavits in which they aver that defendant did not register their apartments with DHCR or offer them rent-stabilized leases after *Roberts* (13 NY3d 270) was decided in 2009. Instead according to these plaintiffs, at lease renewal time, defendant raised the rent to an amount that the plaintiff could not afford and offered a different apartment with an affordable preferential rent, or refused to renew the lease, or threatened eviction. Plaintiffs contend that the leases and defendant's practices prevented them from discovering that their apartments were rent stabilized and demonstrate that defendant was aware that the law required it to register its apartments and to disclose this to plaintiffs. Plaintiffs assert that defendant's pattern of conduct distinguishes this case from those in which landlords genuinely believed they could deregulate apartments while receiving J-51 tax benefits.

In opposition, defendant denies that it engaged in a fraudulent scheme submitting the affidavit of an agent of its management company (EFM), David Edelstein, who avers that defendant deregulated the Deregulated Apartments based upon the belief that it was legal to do so. Edelstein also avers that due to a communication error, EFM employee, Leon Frost, was not

[4] "Defendant was required to give written notice to the first tenant of the apartment after the apartment became exempt from rent stabilization, indicating the last regulated rent, the reason that the apartment is no longer subject to rent stabilization, and how the rent amount is computed (RSC § 2522.5[c][1])" (*Fuentes v Kwik Realty LLC*, 186 AD3d 435, 437 [1st Dept 2020]).

informed about the regulatory status of the apartments (NYSCEF Doc. No. 135, ¶ 3). Frost, whom some plaintiffs allege informed them that their leases would not be renewed, submits an affidavit in which he states that he, EFM and defendant were not engaged in a scheme to fraudulently evade the rent stabilization law, and that he was not aware of certain rent regulations which was, at most, a mistake. Frost disputes plaintiffs' contention that defendant had a policy of requiring tenants to move, and demonstrates that his deposition testimony, upon which plaintiffs rely, reflects that he testified that there was no policy to move tenants to other apartments (NYSCEF Doc. No. 166 at 190). Frost avers that he had no intent to mislead or defraud and denies that he attempted to force Greenberg-Cohen to move, stating that Greenberg-Cohen could not afford the apartment and moved of her own volition (NYSCEF Doc. No. 136, ¶ 18). Frost denies that he attempted to force Shaner, and Dragich and Wang, out of their apartments, avers that Van Wijk was willing to move, and denies any intent to force her out as part of a scheme.

Plaintiffs rely in part on the HSTPA to support their argument seeking review of the entire rent history of their apartments to determine the last reliable rent and contend that damages should be calculated in accordance with HSTPA. However, as plaintiffs acknowledge in reply, HSTPA does not govern this action (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 362 [2020]; *Goldfeder v Cenpark Realty LLC*, 187 AD3d 572, 572 [1st Dept 2020]; *435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 509-510 [1st Dept 2020]). Thus, the pre-HSTPA statute of limitations, lookback period and damages provisions apply (*id.*); *Kuzmich v 50 Murray St. Acquisition LLC,* 187 AD3d 670, 670 [1st Dept 2020]).

The parties dispute the amount of the base date rent, which is required to determine an overcharge. Absent fraud, a rent overcharge claim is subject to a four-year statute of limitations, with an overcharge claim calculated using the legal regulated rent in effect on the base date, four years prior to the filing of the action, to which is added lawful increases and adjustments (Former Rent Stabilization code [9 NYCRR] § 2520.6 [f] [1]; *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.,* 15 NY3d 358, at 366-367 [2010]). Where a tenant provides evidence of fraud, courts examine the entire rental history to ascertain whether the base date rent is lawful (*Matter of Grimm* at 366), but "'*not to furnish evidence for calculation of the base date rent*'" (*435 Cent.,*183 AD3d at 510, quoting *Matter of Regina Metro.*, 35 NY3d at 355 [emphasis added]). Where a court finds that fraud has tainted the base rent so that reliable rent records are not available, a "default formula," using "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (the default formula) is employed to set the base rent and for overcharge calculations (*Thornton v Baron*, 5 NY3d 175, 179-180 n 1 [2005]; *Matter of Grimm*, 15 NY3d at 367; *435 Cent.,* 183 AD3d at 509). Absent fraud, where a landlord has deregulated an apartment while receiving J-51 benefits, "'the base date rent [is] the rent actually charged on the base date . . . and overcharges [are] to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period'" (*435 Cent.,* 183 AD3d at 510 [internal quotation marks and citation omitted]; *Corcoran v Narrows Bayview Company, LLC*, 183 AD3d 511, 511 [1st Dept 2020] [in absence of fraud, correct base

rent is $2,000, which is the rent actually paid by the prior tenants on the April 2006 base date]).[5]

Miller and Greenberg-Cohen

Miller's apartment, apartment 33, and Greenberg-Cohen's second apartment, apartment 4, were never deregulated. Miller was provided a rent-stabilized lease in 1999 and Greenberg-Cohen one, in 2013, for apartment 4. While Greenberg-Cohen avers that she was forced to move from apartment 31, to apartment 4, as part of defendant's fraudulent checkerboarding scheme, she seeks recovery here for apartment 4, for which she received a rent-stabilized lease over four years prior to the date she joined this action. Miller and Cohen point to rent jumps in the rent history, prior to the four-year lookback period, but such jumps, and discrepancies in the rent registration statement, do not suffice as indicia of fraud permitting inquiry "beyond the four-year statute of limitations" *(Matter of Trainer v State of N.Y. Div. of Hous. & Community Renewal* (162 AD3d 461, 463 [1st Dept 2018]; *Matter of Grimm*, 15 NY3d at 367; *see also Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018] [prior rent increases and skepticism about improvements insufficient to show fraud]). Miller and Greenberg-Cohen do not adequately demonstrate fraud concerning their current apartments, as is required to permit review of the rent history for these apartments prior to the four-year lookback period. The legal regulated rent for each apartment has been registered with DHCR. Miller and Greenberg-Cohen do not claim

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[5] In *Matter of Regina Metro.* (35 NY3d at 359), the Court opined that, absent fraud, in calculating rent overcharges, the base rent for an apartment is the rent actually charged four years prior to the filing of the complaint, even if going further back in an apartment's rent history would demonstrate that the amount charged on the base date was erroneous.

that increases during the relevant four-years period were not in accordance with permissible New York City Rent Guidelines Board increases.

Accordingly, Miller's and Greenberg-Cohen's motions, to set the base date rent for their respective apartments at dates prior to the base date, must be denied and as the rents for the two apartments have been registered with DHCR, defendant's request that the court set the rent for those apartments is moot.

The Deregulated Apartments

As a general rule, where landlords deregulate an apartment based upon guidance from DCHR that it was permissible to do so, fraud, and rent freezes, are generally not implicated, without more (*Matter of Regina Metro.*, 35 NY3d at 356, 358, n 9 [2020]). "[N]either an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud" (*Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d at 434).

Plaintiffs allege a multi-faceted building scheme, with one prong involving defendant's conduct with prior rent-stabilized tenants. However, on this record, plaintiffs do not provide sufficient evidence to show why prior tenants left their apartments and, thus, do not demonstrate the checkerboarding scheme which they allege resulted in improper deregulation. Plaintiffs also do not demonstrate that defendant could not charge preferential rents to tenants with rent-stabilized apartments or raise those rents to the legal regulated rent at renewal. Plaintiffs contend that DHCR rent histories demonstrate high turnover rates for several of the Deregulated Apartments, but provide no evidence demonstrating what normal turnover levels would be during the time periods involved. A determination that the turnover rates were unusually elevated may not be drawn, as such a determination would require the impermissible drawing of an unfavorable inference against the nonmoving party (Negri v Stop & Shop, 65 NY2d 625, 626

[1985] [a court must view the evidence in the light favorable to the nonmoving party granting it the benefit of all reasonable inferences that can be drawn from the evidence]).

In addition, the affidavits of Edelstein and Frost raise factual issues concerning what occurred with the Deregulated Apartments, and whether defendant was engaged in a fraudulent scheme. Credibility determinations concerning Edelstein and Frost's averments may not be made on summary judgment, but merely raise factual issues (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012] [court's function is not to make credibility determinations or findings of fact but to identify material triable issues of fact]; *IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 [1st Dept 2011], *affd* 19 NY3d 850 [2012] ["[I]ssue finding, not issue resolution, is a court's proper function on a motion for summary judgment"]). Furthermore, plaintiffs' averments as to defendant's conduct are not uniform,[6] and defendant, through the Frost and Edelstein affidavits, disputes plaintiffs' assertions that defendant did, or attempted to, force them out of their apartments. These disputed factual issues cannot be resolved on a summary judgment motion (*IDX Capital*, 83 AD3d at 570).[7]

Plaintiffs also move to freeze the base date rent, pursuant to RSL 26-517 (e)[8], at an amount which each plaintiff has chosen from the rent history as the last reliable legal rent, due to

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[6] While defendant's June 5, 2017 letter to Van Wijk is evidence that defendant was attempting to get her to vacate her apartment, other plaintiffs with Deregulated Apartments aver that, at different points in time, over years, they were either offered other apartments at renewal, provided late renewals, or denied a renewal lease. Schiffer contends that defendant did not request that she leave or offer her a different apartment. On another note, plaintiffs do not adequately demonstrate a connection between defendant's building or management company and any building owned by Susan Edelstein.

[7] Whether, as plaintiffs argue, defendants' late registrations were filed to deceive subsequent, nonparty, tenants, to continue the scheme, does not resolve the issues here.

[8] RSL 26-517 (e) provides in pertinent part that "[t]he failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner

defendant's filing of late registrations with rents that were not charged to or paid by plaintiffs with Deregulated Apartments. defendant opposes, stating that it registered the rents based on the law at the time of filing. Moreover, the Court of Appeals has rejected the applicability of the rent-freezing provision to *Roberts*-type cases, where the failure to file a proper rent registration resulted from a misunderstanding of the law, and not a fraudulent scheme to avoid rent stabilization (*Regina Metropolitan*, 35 NY3d at 358, n 9). Since a factual issue remains as to defendant's fraud, and the base date rent for the Deregulated Apartments cannot been determined at this juncture, a determination as to freezing the base date

rent is premature. Plaintiffs' reply footnote, urging that the court forgo use of the default formula, because rents in other apartments in the Building were fraudulently

raised, is not supported with evidence about the other apartments or legal

authority. Plaintiffs' rent overcharge claims are not susceptible to summary

disposition since triable factual issues remain (*see Matter of Grimm*, 15 NY3d at 367).

Accordingly, plaintiffs' motion to set rents and for overcharges must be denied.

Plaintiffs' Motion to Strike Affirmative Defenses and Dismiss Counterclaims

As to that branch of plaintiffs' motion seeking dismissal pursuant to CPLR 3211 (a) (7), defendant's pleading must be afforded a liberal construction, the allegations in it taken as true and defendant must be afforded the benefit of every possible favorable inference (*Charles Schwab Corp. v Goldman Sachs Grp., Inc.*, 186 AD3d 431, 435 [1st Dept 2020]). In considering the sufficiency of a pleading a pursuant to CPLR 3211 (a) (7), the court must "determine

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from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. . ."

whether, accepting as true the factual averments of the [pleading], [defendant] can succeed upon any reasonable view of the facts stated" (*Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 318 [1995] [internal quotation marks and citation omitted]).

Plaintiffs argue that defendant's statute of limitations defense is no longer viable, presumably due to the enactment of the HSTPA, and inapplicable due to defendant's fraudulent scheme. This argument is unpersuasive because, as discussed above, the HSTPA does not apply to this overcharge action and factual issues remain as to fraud. To the extent that plaintiffs move to dismiss other affirmative defenses, plaintiffs' application is not adequately articulated.

Plaintiffs argue that defendant's counterclaim for attorneys' fees must be dismissed because the answer does not contain allegations of plaintiffs' default required for attorneys' fees under plaintiffs' leases. Defendant's counterclaim for attorneys' fees alleges that the leases contain a provision entitling defendant to recover legal fees incurred in defense of actions brought against it. However, defendant's counterclaim allegations made "on information and belief," are conclusory, and defendant cites to no provision in the leases permitting it to recover attorneys' fees under the circumstances presented here. Review of the leases does not reveal such a provision. Accordingly, defendant's counterclaim for attorneys' fees must be dismissed.

In its opposition to plaintiffs' summary judgment motion, defendant requests that the court set rents based upon defendant's reconstruction of the rents for the Deregulated Apartments. This request is opposed by plaintiffs. In its own motion, sequence No. 005, defendant takes the position that this is not the proper method to set the rents. Accordingly, this request by way of opposition to plaintiffs' motion must be denied.

Defendant's Summary Judgment Motion

In motion sequence No. 005, defendant moves for summary judgment in its favor, and for an order setting the rents for the Deregulated Apartments based upon base date rent charged in submitted leases for the plaintiffs. As a threshold issue, plaintiffs argue that defendant's summary judgment motion should not be considered because it is merely a renewal motion based upon the recent Court of Appeals decision in *Matter of Regina Metro*. (35 NY3d 332). This argument is without merit because no order for motion sequence No. 004 had been issued when defendant moved for summary judgment (*see* CPLR 2221 [requiring prior motion and order]).

Plaintiffs next argue that defendant's motion for summary judgment is untimely. The Note of Issue was filed on February 25, 2020. Pursuant to this court's rules, defendant then had 60 days from that date to file a summary judgment motion. However, Executive Order 202.8 tolled defendant's deadline to file a CPLR 3212 (a) summary judgment motion. By this court's order, dated May 28, 2020, any motions for summary judgment that were to be filed during the suspension of non-essential matters, beginning on March 22, 2020, were to be filed within 60 days of May 28, 2020. As defendant filed its motion on May 13, 2020, its motion is timely.

Challenging plaintiffs' allegations of a building-wide fraudulent scheme, defendant argues that: (1) each apartment must be reviewed separately, (2) defendant has provided rental records for 20 years, the review of which reveals that plaintiffs' claims are spurious; and (3) analysis for rent overcharge claims is limited to the four-year lookback period unless fraud is substantiated. defendant relies heavily on the Court of Appeal's discussion concerning pre-HSTPA law in *Matter of Regina Metro.*, highlighting discussion about the determination of the base date, and when, and for what purposes an apartment's rent history may be reviewed.

In support of defendant's motion, Edelstein repeats his averments offered in opposition to motion sequence No. 4 and adds that, to the best of his recollection, defendant "first became aware of the rent registration status of the building in 2017 upon receipt of correspondence from DHCR regarding the issue" (NYSCEF Doc. No. 177, ¶ 4). Assuming arguendo that defendant did not, initially, fraudulently deregulate the apartments, a landlord's willful noncompliance with its obligation to register apartments as rent stabilized after 2013 may be evidence demonstrating a scheme (see Nolte v Bridgestone Assoc., LLC, 167 AD3d 498, 498 [1st Dept 2018]). On defendant's motion, the affidavits defendant submits must be viewed in plaintiff's favor (Negri, 65 NY2d at 626). Edelstein asserts that defendant learned that it needed to register the apartments in 2017, but does not address DHCR's 2016 letter or defendant's registration of apartment 31, in August 2015, and apartment 53, in August 2016, raising a factual issue concerning defendant's knowledge about its duty to register and whether defendant's conduct reflects mere error.

Defendant submits the leases for the Deregulated Apartments, which indicate that those apartments were not rent stabilized. Plaintiffs submit affidavits, Frost's 2017 letter to Van Wijk, and a written transcription of what Van Wijk avers were her recorded March 2017 telephone conversations with Frost, during which he informed her that she would be evicted.[9] This conflicting evidence raises factual issues as to whether defendant was willfully failing to comply

[9] Assuming *arguendo* that Van Wijk's transcript of her telephone discussion with Frost is inadmissible, it may be considered here in light of Owner's June 5, 2017 letter to Van Wijk, as the transcript is not the only opposition evidence (*see Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018] [inadmissible hearsay may be offered in opposition to a motion for summary judgment if it is not the only evidence]; *Rugova v Davis*, 112 AD3d 404, 404 [1st Dept 2013] [same]). Owner's letter demanded that Van Wijk vacate after Owner had already registered her apartment, from which an inference may be drawn that Owner implicitly represented to her that that the apartment was not rent-stabilized, knowing that it was. On this motion, it is unnecessary to reach the issue of the transcript's admissibility at trial.

with its obligation to timely renew leases (9 NYCRR § 2523.5[a]),[10] years after *Roberts* and *Gerstein* were decided, and intentionally obscured from plaintiffs that their apartments were rent stabilized in order to keep the apartments deregulated.[11] The deregulated Tenants also provide evidence of rent jumps and registration problems. Accordingly, under these circumstances, defendant's motion for summary judgment must be denied.

CONCLUSION

In light of the foregoing it is

ORDERED that the branch of motion for summary judgment of plaintiffs John Anderson, Helen Leshinsky, Jacqueline Schiffer, Arlene Shaner, and Melissa Van Wjik, sequence No. 004, on the second cause of action is granted to the extent that these plaintiffs are entitled to a judgment declaring that their apartments are subject to the Rent Stabilization Law, and shall remain so until these plaintiffs vacate them; and it is further

ADJUDGED and DECLARED that the apartments of plaintiffs John Anderson (apartment 61A), Helen Leshinsky (apartment 25A), Jacqueline Schiffer (apartment 63A), Arlene Shaner (apartment 45A), and Melissa Van Wjik (apartment 36), in the residential building located at 812 West 181th Street in New York, New York are subject to the protections of the Rent Stabilization Law, and that their apartments shall remain rent-stabilized until plaintiffs vacate their apartments; and it is further

ORDERED that that the branch of motion for summary judgment of plaintiffs Joanna Dragich and Louisa Wang, sequence No. 004, on the second cause of action is

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[10] For apartment 53, which Wang and Dragich aver that they vacated, the record does not reveal whether the current tenant, who may be impacted by the setting of the legal regulated rent, has been joined.

[11] There is no dispute that Owner did not commence registering the apartments of Anderson, Leshinsky, Shaner, Shiffer and Van Wijk until May 2017.

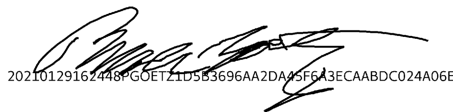
granted to the extent that these plaintiffs are entitled to a judgment declaring that their former apartment was subject to the Rent Stabilization Law for the duration of their tenancy in that apartment; and it is further

ADJUDGED and DECLARED that apartment 53 in the residential building located at 812 West 181th Street in New York, New York, was subject to the protections of the Rent Stabilization Law during the term of the tenancy of plaintiffs Joanna Dragich and Louisa Wang; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment, sequence No. 004, for an order dismissing the defendant's affirmative defenses and counterclaim is granted to the extent that the defendant's counterclaim for attorneys' fees is dismissed; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment, sequence No. 004, seeking an order determining and setting the lawful legal rent for each plaintiffs' apartment, freezing each plaintiff's rent, and for injunctive relief and an award of damages for overcharges is denied; and it is further

ORDERED that the branch of defendant's motion for summary judgment, sequence No. 005, for an order determining and setting the lawful legal rent for each plaintiffs' apartment is denied.



1/29/2021			
DATE		PAUL A. GOETZ, J.S.C.	

CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE